



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Nelson Electric, Marine Division
File: B-227906
Date: September 21, 1987

DIGEST

Decision whether reopening negotiations based on a late proposal modification is in the government's best interest is within the contracting officer's discretion. Contracting officer did not abuse that discretion in deciding to reopen where the late modification showed the availability of prices significantly lower than those received in the best and final offers.

DECISION

Nelson Electric, Marine Division, protests the award of a contract to SPD Technologies, Inc., under request for proposals (RFP) No. N00140-87-R-9356, issued by the Department of the Navy. Nelson's protest initially raised several issues; however, as a result of a bid protest conference held at our Office, the only substantive issue for our consideration is whether the Navy improperly reopened negotiations to take advantage of knowledge, gained from a late modification of a best and final offer, concerning the availability of significantly lower prices.

We deny the protest.

The RFP sought offers on three line items. Item No. 001 was for circuit breakers of 25 amp capacity and accompanying electrical panels; item No. 002 was for 400 amp circuit breakers and panels; and item No. 003 consisted of data concerning the first two items. The protest concerns only the item No. 001 equipment, since Nelson is not in line for award of item No. 002. The electrical panels can be obtained from a number of sources; however, only two sources can furnish the circuit breakers--Gould Inc., Systems Protection Division, and Westinghouse. Nelson's initial best and final offer (BAFO) for item No. 001, based on Westinghouse breakers, was about \$188,000 lower than Gould's initial offer.

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Following the submission of BAFO's, members of Gould's management bought Gould's Systems Protection Division and formed a new company called SPD Technologies. About 1 month later, SPD submitted a late modification to its predecessor's (Gould's) BAFO substantially reducing the price for item No. 001 (to about \$74,000 lower than Nelson's price). The contracting officer, thus made aware of the availability of lower prices, reopened negotiations and called for a second round of BAFO's. The second round of BAFO's resulted in SPD offering a price for item No. 001 about \$52,000 lower than Nelson's (Nelson also dropped its price for the item). The Navy awarded the contract to SPD.

Nelson argues that the Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.412 (1986), which generally bars the consideration of late proposal modifications, also effectively precludes the reopening of negotiations based on late modifications. Nelson urges that the regulation does not permit a contracting officer to "look at a late modification and elect, if the price is advantageous to the government, to take some action because of that offer." In support of its argument, Nelson cites our decision in Rexroth Corp., B-220015, Nov. 1, 1985, 85-2 C.P.D. ¶ 505, in which we state that an offeror should not be allowed unilaterally to disrupt a procurement based on price competition, and force the opening of negotiations following the submission of initial proposals, merely by offering a late price reduction, especially where the offeror may have determined the identity of the intended awardee and so discerned that its price is too high. Nelson speculates that SPD may have known that Nelson was in line for award.

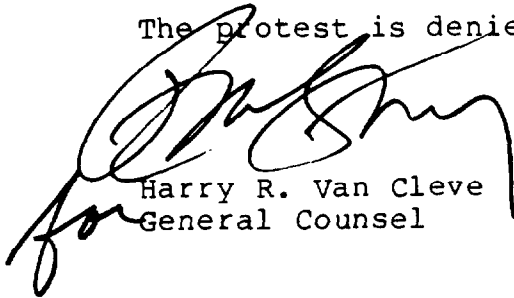
Initially, we point out that the issue in Rexroth was whether the government could be forced to initiate negotiations--instead of awarding a contract based on initial proposals--in response to a late price modification. Here, however, the issue is whether the government, already having concluded discussions, is precluded from conducting another round. Our holding in Rexroth thus is not directly applicable here.

We find no legal merit in Nelson's protest. The reason is that FAR, 48 C.F.R. § 15.611(c), authorizes contracting officers to reopen discussions after BAFO's when it clearly is in the government's interest to do so. That decision is within the contracting officer's discretion, and essentially should be based on whether the late modification fairly indicates that negotiations would be highly advantageous to the government. See Real Fresh, Inc., B-204604, Dec. 31, 1981, 81-2 C.P.D. ¶ 522. Consequently, although SPD had no legal right to a reopening of discussions, the contracting

officer was not precluded from reopening based on the firm's late modification.

Moreover, we cannot conclude that it clearly was not in the government's best interest to take advantage of a possible \$74,000 savings, which represented almost 10 percent of the price of the contract the Navy was prepared to award to Nelson. We do not think the contracting officer abused his discretion when he decided reopening in fact was warranted in such circumstances. Further, as noted above, all offerors then properly were afforded the same opportunity to revise their first BAFO's in response to the reopening.

The protest is denied.



Harry R. Van Cleve
General Counsel